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No. 98-254

In The

Supreme Court of the United States

October Term, 1998

PRINCESS CRUISES, INCORPORATED,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Was the Fourth Circuit Court of Appeals correct in invoking the common law and RESTATEMENT (SECOND) OF CONTRACTS to supply the rule of decision in assessing the formation of a maritime services contract?

LIST OF PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Respondent General Electric Company ("GE") itself has common stock and debt securities which are publicly traded. General Electric Company also has a number of subsidiaries in the United States and elsewhere. There are, however, only a limited number of these subsidiaries which have any outstanding equity or debt securities which are publicly held.

Those with publicly-held equity securities are:

— CAMCO, Inc. (Canada)

— General Electric Capital Corporation (formerly General Electric Credit Corporation)

— Montgomery Ward & Co., Incorporated

— Nuovo Pignone (Italy)

Those which have only publicly-held debt securities are:

— Credit DeL'Est

— Finax FS AB

— Finax KK AB

— GE Capital Aviation Services, Ltd.

— GE Capital Mortgage Services, Inc.

— GE Capital (NZ) Ltd. (New Zealand company)

List of Parties to the Proceeding (Continued)

— GE Capital PTY LTD. (Australian company)

— GECC Financial Corporation (Hawaii)

— GNA Corporation

— Gate Finance Corporation

— General Electric Capital Canada, Inc.

— General Electric Capital Services, Inc. (formerly General Electrical Financial Services, Inc.)

— General Electric Credit International, N.V.

— Imaging Financial Services, Inc. (formerly Eastman Kodak Credit Corp.)

— International GE Capital Corporation

— Mercur Bank (Austria)

— Service Bank GmbH

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties to the Proceeding	ii
Table of Contents	iv
Table of Cited Authorities	vi
Opinions Below	1
Statement of the Case	1
Jurisdictional Statement	1
Reasons for Denying the Writ	2
I. The Fourth Circuit's Decision Not To Apply U.C.C. Sales Provisions In A Maritime Services Contract Is In Accord With Standard Commercial Practice, And Does Not Conflict With Other Circuit Court Decisions.	4
II. The Fourth Circuit Properly Considered The Common Law To Supply The Rule Of Decision In This Maritime Contract Dispute.	8
A. Federal Admiralty Courts May Look to the General Common Law or State Law for a Rule of Decision when There is No Applicable Federal Admiralty Rule.	8

Contents

		Page
B.	Foisting the U.C.C. Sales Provisions Upon a Service Contract Contradicts the Uniform Interpretation of the U.C.C. by the Federal Circuit Courts.	11
Conclusion		14

TABLE OF CITED AUTHORITIES

Page

Cases:

Advent Systems Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991) 11

American Dredging Co. v. Miller, 510 U.S. 443, 114 S. Ct. 981 (1994) 9

Asphalt International, Inc. v. Enterprise Shipping Corp., 667 F.2d 261 (2d Cir. 1981) 6

Bailey Farms, Inc. v. NOR-AM Chem. Co., 27 F.3d 188 (6th Cir. 1994) 12

Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974) 12

Cambridge Plating Co. v. Napco, Inc., 991 F.2d 21 (1st Cir. 1993) 11

Clem Perrin Marine Towing, Inc. v. Panama Canal Co., 730 F.2d 186 (5th Cir. 1984) 4, 5

Coakley and Williams, Inc. v. Shatterproof Glass Corp., 778 F.2d 196 (4th Cir. 1985), *cert. denied*, 475 U.S. 1121, 106 S. Ct. 1640 (1986) 12

East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S. Ct. 2295 (1986) 9

Employers Insurance of Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752 (5th Cir. 1989) 5, 6

Table of Cited Authorities

	Page
F/V Robins Nest, Inc. v. Atlantic Marine Diesel, Inc., No. 92-3900 (JEI), 1994 W.L. 594592, *2 (D. N.J., Oct. 24, 1994)	7
Hope's Architectural Prod., Inc. v. Lundy's Constr., Inc., 781 F. Supp. 711 (D. Kan. 1991), *aff'd*, 1 F.3d 1249 (10th Cir. 1993)	12
Interpool, Ltd. v. Char Yigh Marine (Panama) S. A., 890 F.2d 1453 (9th Cir. 1989)	6, 7
Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043 (1995)	9
Madruga v. Superior Court, 346 U.S. 556, 74 S. Ct. 298 (1954)	9
Maru Shipping Co. v. Burmeister & Wain American Corp., 528 F. Supp. 210 (S.D. N.Y. 1981)	7, 8
Princess Cruises, Inc. v. General Electric Co., 143 F.3d 828 (4th Cir. 1998)	1, 3, 4, 5, 8, 9, 10, 13
Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 44 S. Ct. 274 (1924)	9
Republic Steel Corp. v. Pennsylvania Eng'g Corp., 785 F.2d 174 (7th Cir. 1986)	12
RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543 (9th Cir. 1985)	12

Table of Cited Authorities

	Page
Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737 (2d Cir. 1979)	11
Walker v. Sears, Roebuck & Co., 853 F.2d 355 (5th Cir. 1988)	12
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1332	1
Other Authorities:	
U.C.C. Article II	2, 5
U.C.C. § 2-207	4, 5, 6, 8
U.C.C. § 2-609	5

OPINIONS BELOW

GE agrees with the Petitioner's identification of the opinions below which are incorporated in the Appendix to the Petition.

STATEMENT OF THE CASE

GE incorporates by reference the statement of the case recited by the United States Court of Appeals for the Fourth Circuit in *Princess Cruises, Inc. v. General Electric Co.*, 143 F.3d 828, 830-31 (4th Cir. 1998), App. A-2-6.

JURISDICTIONAL STATEMENT

Petitioner Princess Cruises, Inc. ("Princess") brought this action in the United States District Court for the Eastern District of Virginia, Norfolk Division ("District Court"), pursuant to 28 U.S.C. § 1332. Princess alleged, *inter alia*, breach of a maritime services contract. After a jury verdict in favor of Princess for primarily incidental and consequential damages, GE filed a Renewed Motion for Judgment as a Matter of Law. The Renewed Motion for Judgment as a Matter of Law requested that the District Court vacate that portion of the jury's award which reflected incidental and consequential damages, because the parties' contract had a limitation of liability provision. The District Court denied GE's Motion. GE appealed that denial and the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") reversed the District Court, thereby reducing the verdict from $4,577,743 to $231,925. *Princess*, 143 F.3d at 835, App. A-16. Princess petitioned for review of the decision of the Fourth Circuit and invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

At the crux of Princess' argument is a request for this Court to make the sweeping pronouncement that U.C.C. sales provisions are applicable to all maritime transactions, regardless of the nature of the transaction. The fallacy in this argument is that Article II of the U.C.C. is self-limiting. Article II of the U.C.C. only applies where the sale of goods is the predominant purpose of the transaction. In land-based contracts, federal circuit courts uniformly differentiate between sales contracts and service contracts when determining whether to apply the U.C.C. Princess argues that this consistent differentiation between contracts for the provision of goods and services is irrelevant in admiralty cases. Princess' position, however, will result in an inconsistent interpretation of the U.C.C., which defeats the Code's objective in achieving uniform results.

The Fourth Circuit declined to expand the U.C.C.'s reach beyond its recognized scope merely because this was a maritime case. The Fourth Circuit held that the same principles of contract formation should apply both in admiralty and land-based cases. In rejecting Princess' argument below, the Fourth Circuit stated:

> Given admiralty law's goals of uniformity and predictability, we find that mixed maritime contracts for goods and services are subject to the same inquiry as land-based mixed contracts. Therefore, a court must first determine whether the predominant purpose of the transaction is the sale of goods. Once this initial analysis has been performed, the court then may properly decide whether the common law, the U.C.C., or other statutory law governs the transaction.

Princess, 143 F.3d at 832, App. A-9. The Fourth Circuit's threshold analysis of whether the sale of goods predominated before applying the U.C.C.'s sale of goods provisions is in accord with the other circuit courts' interpretation of the U.C.C. *Id.* at 833, App. A-10. After making that determination, the Fourth Circuit found as a matter of law that the contract was predominantly for services, so the U.C.C. sales provisions were not applicable.[1] *Id.* at 832-34, App. A-9-13.

Princess nonetheless urges this Court to review the Fourth Circuit's decision based upon Princess' contention that there is a "major split" among the circuits on this issue (Pet. 7), and based upon Princess' allegation that the Fourth Circuit abdicated its role as a federal court in fashioning maritime law. Pet. 11. Princess' advocacy should be viewed in the context of what Princess ultimately asks this Court to hold: Princess urges this Court to adopt the sales provisions of the U.C.C. as a staple of maritime law regardless of the Code's inapplicability to a particular transaction, under the pretext of promoting uniformity in admiralty law. But if there is no prohibition on borrowing a body of law which would not otherwise apply to the transaction, then there will be no uniformity or predictability in maritime decisions at all.

As will hereafter follow, there is no "major conflict" between the circuits on this issue, and the Fourth Circuit correctly exercised its admiralty function of borrowing general common law principles in formulating its rule of decision where there was no established admiralty rule of law. The Fourth

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1. Princess has not petitioned for review of the Fourth Circuit's decision that the contract was for services. In fact, Princess' Question Presented For Review refers to the contract as a "maritime services contract", and the Petition identified the services alleged to be in dispute as those involving inspection and reinstallation of the ship's turbine rotor. Pet. 2.

Circuit's opinion is in accord with standard commercial practices, and consistent with the decisions of the other federal circuit courts. Princess' Writ should therefore be denied.

I.

THE FOURTH CIRCUIT'S DECISION NOT TO APPLY U.C.C. SALES PROVISIONS IN A MARITIME SERVICES CONTRACT IS IN ACCORD WITH STANDARD COMMERCIAL PRACTICE, AND DOES NOT CONFLICT WITH OTHER CIRCUIT COURT DECISIONS.

Princess cited factually and legally distinguishable cases from various jurisdictions in an attempt to persuade this Court that there is a "major conflict" between the Fourth Circuit's opinion and other circuit court decisions. Pet. 8-10. The cases Princess cited, however, do not directly address the issue in this case: whether Section 2-207 of the U.C.C. or the RESTATEMENT (SECOND) OF CONTRACTS ("RESTATEMENT") should be applied when assessing the formation of a maritime services contract. The Fourth Circuit carefully and thoroughly analyzed the same cases Princess raised in its Petition to this Court, and correctly concluded that the cases had no bearing on the question presented here. *Princess*, 143 F.3d at 832, App. A-8-9.[2]

Princess cited *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186 (5th Cir. 1984), for the proposition that "the U.C.C. has been regarded as a source both for admiralty and federal common law." Pet. 8. In the instant case,

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2. While Princess has included some additional district court cases to bolster its previously rejected arguments (Pet. 10 n.1), those cases do not justify concluding that there is a schism among the circuit courts which requires this Court to grant Princess' writ.

the Fourth Circuit agreed that the U.C.C. is a source of admiralty law, but disagreed that the U.C.C. applied to all maritime contracts regardless of the nature of the transaction. *Princess*, 143 F.3d at 832, App. A-8. The nature of the transaction in *Clem Perrin*, however, did not involve a maritime service contract. Instead, the dispute involved a breach of contract suit on a lease-purchase agreement. *Clem Perrin*, 730 F.2d at 187. The court looked to U.C.C. § 2-609 in determining that a defendant properly sought assurance from a plaintiff before paying the final installment of its lease. *Id.* at 191. The facts of *Clem Perrin* are quite dissimilar to those in the instant case, and therefore *Clem Perrin* does not conflict with the Fourth Circuit's decision to reject the application of U.C.C. § 2-207 to a service contract.

Princess also cited *Employers Insurance of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752 (5th Cir. 1989) for the proposition that "in construing a contract for services, courts are free to reason by analogy to U.C.C. § 2-316(1)." Pet. 9. This statement, made in a footnote, is dicta. *Wausau*, 866 F.2d at 765 n.25. In *Wausau*, the Fifth Circuit held that a maritime plaintiff could not recover for purely economic loss from a provider of professional services on a negligent performance of contract theory. *Id.* at 766. That holding has no bearing on this appeal.

The footnote in *Wausau* on which Princess relies is not controlling. The court's footnote references a U.C.C. warranty section, not Section 2-207. *Id.* at 765 n.25. Also, as the Fourth Circuit noted in the instant case, the Fifth Circuit offered no support for its statement that "in construing a contract for services, courts are free to reason by analogy to . . . [the U.C.C.]." *Princess*, 143 F.3d at 832, quoting *Wausau*, 866 F.2d at 765 n.25. The grounds for this emancipation from the recognized limits of Article II of the U.C.C. are unexplained.

More importantly, the *Wausau* court stated in the footnote that it was "unlikely that a substantially different outcome would result from the application of traditional common law contract principles". *Wausau*, 866 F.2d at 765 n.25. In the instant case, the common law's last shot doctrine and U.C.C. § 2-207 dictate diametrically different outcomes. Therefore, the *Wausau* reasoning is inapposite.

The *Wausau* court underscored the limitations on reasoning by analogy later in its opinion. The court stated:

> [I]f the contract is not governed by the U.C.C., it is not clear that the parties should be made, simply by force of analogy, to "accept the legal consequences" of making a contract subject to these particular code provisions.

Wausau, 866 F.2d at 777 n.53. Princess asks this Court to force all parties to a maritime contract to accept the legal consequences of U.C.C. 2-207 simply by force of analogy.

Princess next cited the case of *Asphalt International, Inc. v. Enterprise Shipping Corp.*, 667 F.2d 261 (2d Cir. 1981) for the proposition that maritime courts may look to the U.C.C. for commercial guidance even in cases not involving a sale of goods. Pet. 9-10. The *Asphalt* case is also inapposite. The *Asphalt* court only looked to the U.C.C. for guidance after finding that "traditional avenues of contract interpretation lead us to a *cul-de-sac*. . . ." *Asphalt*, 667 F.2d at 265. In the instant case, applying the principles of the RESTATEMENT leads to a definite answer: GE's documents constituted the contract and those documents include a limitation of liability clause. *Asphalt* is not inconsistent with the Fourth Circuit's decision.

Princess' reliance on *Interpool, Ltd. v. Char Yigh Marine (Panama) S. A.*, 890 F.2d 1453 (9th Cir. 1989) to establish a

circuit conflict is also misplaced. In *Interpool*, the court analyzed the parties' interest in a vessel under charter lease agreements. *Id.* The court reviewed California's enactment of the U.C.C. to determine whether the transaction constituted a security interest or a lease. *Id.* at 1459. The U.C.C. provisions cited were directly applicable and relevant to resolving the dispute. *Interpool*, however, did not address the issue of applying Article II of the U.C.C. to a maritime services contract, contrary to Princess' assertion that "the Ninth Circuit has turned to the U.C.C. to interpret a maritime service contract". Pet. 9. There was no issue of maritime services in *Interpool*. The Fourth Circuit's decision is not in conflict with *Interpool*'s unrelated holding.

In a footnote, Princess cited two cases not raised below. Pet. 10 n.1. These additional cases, however, are unavailing. In *F/V Robins Nest, Inc. v. Atlantic Marine Diesel, Inc.*, No. 92-3900 (JEI), 1994 W.L. 594592, at *2 (D. N.J., Oct. 24, 1994) the district court applied state law to the common law claims in the case because, in part, the application of state law did not pose a threat to uniformity. *Id.* at *2.

In *Maru Shipping Co. v. Burmeister & Wain American Corp.*, 528 F. Supp. 210, 216 (S.D. N.Y. 1981) the district court decided that Section 2-207 should be used to resolve a battle of forms, but only in a dispute involving defective goods. *Maru* involved a contract wherein the defendant sold parts to the plaintiff and performed services on the plaintiff's vessel. *Id.* at 212-13. The court initially concluded that the defendant's repair and service did *not* constitute a breach of contract. Rather, the court found that the defendant's breach involved the sale of goods portion of the contract.[3] Because the dispute centered

3. The Fourth Circuit noted that when determining whether the U.C.C. should apply to GE's service contract, "[I]t is also telling (Cont'd)

upon a sale of defective parts, as opposed to a complaint involving defective services, the court looked to Section 2-207 for guidance. *Id.* at 216. *Maru* is inapposite, however, because Princess and GE entered into a services contract and GE's only alleged breach is a failure to provide service and repair.

None of the cases which Princess cited demonstrate an inconsistency among the other circuit courts and the Fourth Circuit which this Court needs to resolve. The Fourth Circuit correctly held that admiralty courts should look to the RESTATEMENT, not the U.C.C., for the law governing the formation of a services contract.

II.

THE FOURTH CIRCUIT PROPERLY CONSIDERED THE COMMON LAW TO SUPPLY THE RULE OF DECISION IN THIS MARITIME CONTRACT DISPUTE.

A. Federal Admiralty Courts May Look to the General Common Law or State Law for a Rule of Decision when There is No Applicable Federal Admiralty Rule.

Princess accused the Fourth Circuit of abdicating its responsibility to fashion maritime law because the court accepted the RESTATEMENT as the rule of decision when assessing the formation of a maritime services contract. *See* Pet. 11. The Fourth Circuit did not abdicate its responsibility. Rather, it followed the time-honored admiralty tradition of looking to the common law when there is no admiralty rule directly on point. The Fourth Circuit correctly stated:

(Cont'd)
that. . . . the gravaman of Princess' complaint did not arise out of GE's furnishing of deficient parts, but rather out of GE's deficient services". *Princess*, 143 F.3d at 834, App. A-13. *Maru*'s holding focusing on the nature of the breach before applying the U.C.C. is therefore in accord with the Fourth Circuit's analysis.

> When no federal statute or well-established rule of admiralty exists, admiralty law may look to the common law or to state law, either statutory or decisional, to supply the rule of decision.

Princess, 143 F.3d at 834, App. A-13-14.

Borrowing common law doctrines to formulate maritime law, and to fill gaps in the law, is a well recognized role of admiralty courts.[4] Indeed, this Court recognized that the general maritime law is "drawn from state and federal sources," and that "the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules". *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-66, 106 S. Ct. 2295, 2299 (1986). *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546, 115 S. Ct. 1043, 1054 (1995) (holding that it is a "fundamental feature of admiralty law . . . that federal admiralty courts sometimes do apply state law."). Because there was no settled rule on this issue in admiralty law, and because the U.C.C. is inapplicable, the Fourth Circuit had to look to either common-law rules or state law to supply the rule of decision.

Although Princess contends that "the Fourth Circuit has ignored the long line of cases from this Court which have placed

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4. Contrary to Princess' assertions, the exercise of federal maritime jurisdiction does *not* result in automatic displacement of state law. *See American Dredging Co. v. Miller*, 510 U.S. 443, 114 S. Ct. 981 (1994) (upholding the application of a Louisiana state prohibition against applying the doctrine of forum non conveniens); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S. Ct. 274 (1924) (permitting application of a New York law that provided specific performance of an arbitration clause in a maritime contract); *Madruga v. Superior Court*, 346 U.S. 556, 74 S. Ct. 298 (1954) (permitting application of a California partition remedy to supplement the availability of the *in rem* procedure of general maritime law).

the responsibility for fashioning of maritime law squarely into the hands of federal courts," (Pet. 11), Princess mischaracterizes the reasoning the Fourth Circuit used to arrive at its decision. The Fourth Circuit recognized that the contract between the parties was maritime in nature and governed by the substantive law of admiralty. *Princess*, 143 F.3d at 834, App. A-13. In deciding which substantive law to apply, the Fourth Circuit was confronted with Princess' contention that the U.C.C. applied, and GE's contention that the common law applied. *Id.* The question of which rule of law to apply was undecided in the maritime context. *Id.*, but was well settled in land-based cases.

The Fourth Circuit acknowledged that the U.C.C. was a source of admiralty law, but only if the transaction fell within the Code's scope. *Id.* at 832, App. A-9. In analyzing which rule of law to apply, the Fourth Circuit initially considered whether the contract was predominantly for services, or predominantly for the sale of goods. *Id.* at 832-34, App. A-9-13. This inquiry was predictable based upon the uniform construction of the U.C.C. by other circuit courts considering the issue in land-based disputes. The Fourth Circuit concluded that services predominated in the GE-Princess contract. *Id.* at 834, App. A-13. After concluding that the U.C.C. did not apply, the court held that:

> [W]hen the predominant purpose of a maritime or land-based contract is the rendering of services rather than the furnishing of goods, the U.C.C. is inapplicable, and courts must draw on common-law doctrines when interpreting the contract.

Id. at 830, App. A-2.

Princess cannot credibly argue that the Fourth Circuit abdicated its role in fashioning maritime law by looking to the

general common law for guidance after the Fourth Circuit concluded that the parties' contract was for services, a conclusion which Princess has not challenged. The U.C.C., like the RESTATEMENT, is simply a recognized source of uniform law to draw upon in admiralty cases, but whether or not to draw upon the U.C.C. depends upon the transaction. The question is which body of law should apply to a services contract: the RESTATEMENT, or the U.C.C. that applies exclusively to the sale of goods? The Fourth Circuit correctly held that the U.C.C. was limited to contracts predominantly for the sale of goods. After making the initial finding that the parties' contract was for services, the court reasonably declined to borrow the inapplicable U.C.C. provisions in rendering its decision. This is not a case of abdication, but rather the judicious selection of the appropriate rule of decision based upon the record.

B. Foisting the U.C.C. Sales Provisions Upon a Service Contract Contradicts the Uniform Interpretation of the U.C.C. by the Federal Circuit Courts.

For the U.C.C. to remain uniform, there must be a substantial uniformity of construction by the courts. Before applying the U.C.C. to a particular transaction in the land-based context, the federal circuit courts employ the "predominant thrust" or "predominant factor" test to determine if the contract is one for the sale of goods or services. *See Cambridge Plating Co. v. Napco, Inc.*, 991 F.2d 21, 24 (1st Cir. 1993) (stating that " '[c]ontracts whose predominant factor, thrust, or purpose is the rendition of services' are outside the scope of the U.C.C.") (citations omitted); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 742 (2d Cir. 1979) (concluding that contract is for " 'service' rather than 'sale' when 'service predominates,' and sale of items is 'incidental.' "); *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 676 (3d Cir. 1991) (holding that the court considers "the purpose or essence of the contract"

when determining if the U.C.C. applies to a mixed contract.); *Coakley and Williams, Inc. v. Shatterproof Glass Corp.*, 778 F.2d 196, 197-98 (4th Cir. 1985), *cert. denied*, 475 U.S. 1121, 106 S. Ct. 1640 (1986) (noting that test is whether " 'predominant factor', or 'thrust' of the contract at issue was toward service or goods.'"); *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 359 (5th Cir. 1988) (explaining that test is "whether the dominant factor or 'essence' of the transaction is the sale of materials or the services."); *Bailey Farms, Inc. v. NOR-AM Chem. Co.*, 27 F.3d 188, 192 (6th Cir. 1994) (following predominant factor test); *Republic Steel Corp. v. Pennsylvania Eng'g Corp.*, 785 F.2d 174, 181 (7th Cir. 1986) (stating that test for mixed contracts is whether the transaction was "predominantly one for the sale of goods with services incidentally involved, or was one for the rendition of services with the sale of goods incidentally involved.") (citations omitted); *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974) (under this test, courts evaluate transactions to determine if the "predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, or goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)."); *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 546 (9th Cir. 1985) (deciding that when "sale predominates, incidental services provided do not alter the basic transaction.") (citations omitted); *Hope's Architectural Prod., Inc. v. Lundy's Constr., Inc.*, 781 F. Supp. 711, 713 (D. Kan. 1991), *aff'd*, 1 F.3d 1249 (10th Cir. 1993) (applying predominant factor or thrust test for hybrid contract).[5] In light of the uniformity of construction of the U.C.C. by the federal circuit courts in land-based cases, application of U.C.C. principles to the formation of a services contract in a maritime case would cause a breach of reasoning between admiralty

5. Counsel did not locate an Eleventh Circuit decision.

courts and non-admiralty courts on issues involving the formation of a services contract. This anomalous result is not justified by any peculiar concern of admiralty law. There is no reason to rewrite, and reconstrue, the U.C.C. in maritime cases, while limiting its scope in non-maritime cases.

In contrast to the discord created by interpreting the U.C.C. sales provisions differently in the maritime context, reliance on the RESTATEMENT lends predictability and uniformity when analyzing the formation of a maritime services contract. As the Fourth Circuit noted, the majority of states refer to common law principles when assessing contracts for services. *Princess*, 143 F.3d at 834, App. A-14. Application of the RESTATEMENT principles by admiralty courts leads to consistent results, regardless of jurisdiction. Application of RESTATEMENT principles also creates a unity and consistency between the law governing land-based services contracts and the law governing maritime services contracts.

Princess asks this Court to adopt as a "staple" the U.C.C. in all maritime transactions, regardless of the direct applicability of the Code to the circumstances, merely because the Code is uniform. In other words, Princess asks this Court to recognize the U.C.C. as the law in all maritime commerce cases, while at the same time ignoring the numerous and uniform cases which hold that the U.C.C. does not apply to contracts predominantly for services. Princess asks this Court to construe the U.C.C. differently when seen through the prism of maritime law for the sake of obtaining uniformity of decision throughout the country. The flaw with this approach is readily apparent.

CONCLUSION

For the foregoing reasons, Respondent General Electric Company requests this Court to deny the Petition for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Respectfully submitted,

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